No. 11,508

In The

United States Circuit Court of Appeals For the Ninth Circuit

CHESTER FIPPIN and ST. CLAIRE CORPORATION, A Corporation,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWERING BRIEF

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JURISDICTION

The judgment of the United States District Court for the District of Nevada was entered on December 3, 1946, against the appellants (T. R. 14-15) and fines of $1,500.00 and $6,000.00, respectively, were imposed and paid on said date. From this judgment an appeal was taken by both appellants for a review of the judgment under Sec. 255, U. S. C. A., Title 28.

QUESTIONS PRESENTED FOR REVIEW UPON APPEAL

The appellants have assigned four errors upon appeal and intend to rely upon the points raised in said assignments of errors (T. R. 40). In the Opening Brief of appellants, page 5, specific reference is made to the said four Assignments of Error (T. R. 40). In the Argument following, appellants state that the only point relied upon on appeal is that the Information, particularly the Second Count thereof, on which the appellants were convicted, fails to state facts constituting a crime, and that the judg-

ment of conviction rendered thereon is erroneous. The subparagraphs under said Argument, pages 5 and 6 of Appellants' Opening Brief, indicate an argument in support of the four Assignments of Error and, in addition, raise what is tantamount to an additional Assignment of Error. We shall address our reply to the Assignments of Error as set forth in Appellants' Opening Brief.

ARGUMENT

I.

The Information Against The Appellants Does Charge A Criminal Offense and Does State Facts Sufficient To Charge Appellants With The Commission of A Crime.

The Information appears on pages 2 to 5 inclusive of the Transcript of Record, consisting of two counts. We are concerned only with Count Two, to which both appellants entered pleas of nolo contendere, Count One having been dismissed upon motion of the United States Attorney (T. R. 17-19). Both Counts One and Two were dismissed as to James F. Boccardo at that time. The Information was filed October 20, 1946, under the Federal Rules of Criminal Procedure for District Courts of the United States, effective March 21, 1946. (18 U. S. C. A., 687, et seq., 1946 Cumulative Annual Pocket Part).

Rule 7(c) of said rules, sets forth the requirements of an Information as follows:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government.

> It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Count One of the Information fully states the statute, rule and regulation, or other provision of law, which the defendants are alleged to have violated, and charged that the defendants "wilfully did begin the construction, etc." on or about May 1, 1946. The allegations of Count One were incorporated by reference in Count Two, but charged that the defendants, on and after May 1, 1946, "wilfully did carry on and participate in the construction, etc."

The question of the sufficiency of the Information is raised for the first time in this appeal. The first step in laying a foundation for an appeal, if it is apparent that the information does not state a cause of action, is to challenge the same by a proper motion in the trial court. The Transcript of Record fails to show any motion before the judgment attacking the sufficiency of the information on any ground, nor does it show any motion in arrest of the judgment under Rule 34, Federal Rules of Criminal

Procedure, 18 U. S. C. A., 1946 Cumulative Annual Pocket Part, Page 247, or for the correction or reduction of sentence under Rule 35, Federal Rules of Criminal Procedure, 18 U. S. C. A., 1946 Cumulative Annual Pocket Part, page 248.

In *Yates* vs. *United States*, 151 F. (2d), 580, at page 581, on October 5, 1945, the Circuit Court of Appeals, Ninth Circuit, ruled:

> "The indictment was not challenged on the ground of duplicity or any other ground. Whether it was duplicitous need not be considered, the defect, if any, having been cured by verdict."

A further attack upon the sufficiency of the Information is made on the ground that there was a failure to negative the exceptions in VHP-1, pages 24-27, Opening Brief of Appellants.

In *Rose* vs. *United States*, 149 F.(2d), 755, at page 758, the Circuit Court of Appeals, Ninth Circuit, stated:

> "We note the argument that since the tire rationing regulations contained exceptions permitting transfers in certain circumstances by retailers and since appellants were authorized dealers in tires, the language of the indictment charged no public offense. The conclusion does not follow from the stated facts. It is the unlawful scheme to prepare for and accomplish the act of commercially handling tires and tubes contrary to and not in accord with the wartime regulation that constitutes the criminal conspiracy in this case. It is in such a case that exceptions need not be negatived in the indictment.
>
> "Enough is stated in the indictment to reveal the

offense to be met and to protect against double jeopardy. The indictment is adequate."

II.

The Information Does Allege The Commission Of Acts By The Appellants Which Are In Violation Of A Statute Of The United States.

Under the War and Defense Contract Act of June 28, 1940, 50 U. S. C. A., Appendix Sec. 1152, as amended by the Second War Powers Act of 1942, enacted March 27, 1942, 50 U. S. C. A., App. 633, and the First War Powers Act of 1941, 50 U. S. C. A., App. 601, Congress granted extensive powers to the President. The Second War Powers Act (50 U. S. C. A., App. 633, Sec. 2 (2), states:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

Under Sec. 2(8), the said Act further states:

> "The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

The President of the United States, in Executive Order No. 9638, 10 Fed. Reg. 197, on October 4, 1945, transferred the functions and powers of the War Production Board,

previously established by Executive Order No. 9024, dated January 16, 1942, to the Civilian Production Administration, for the following purposes: (Paragraph 3, Executive Order No. 9638)

> "The functions and powers transferred by this order shall, to the extent authorized by law, be utilized to further a swift and orderly transition from wartime production to a maximum peacetime production in industry free from wartime Government controls, with due regard for the stability of prices and costs; and to that end shall be utilized to; (a) expand the production of materials which are in short supply, (b) limit the manufacture of products for which materials or facilities are insufficient, (c) control the accumulation of inventories so as to avoid speculative hoarding and unbalanced distribution which would curtail total production, (d) grant priority assistance to break bottlenecks which would impede the reconversion process, (e) facilitate the fulfillment of relief and other essential export programs, and (f) allocate scarce materials and facilities necessary for the production of low-priced items essential to the continued success of the stabilization program of the Federal Government."

Said Order became effective November 3, 1945.

On March, 26, 1946, the Civilian Production Administration, under the authority vested in that agency under Executive Order No. 9638, above mentioned, issued the Veterans' Emergency Housing Program, Order 1 (VHP-1), effective March 26, 1946. Under Sec. 3(c) of said VHP-1, certain construction was prohibited in the following language:

> "Prohibited construction. (1) No person shall begin to construct, to repair, to make additions or

alterations to, to improve, to convert from one purpose to another, or to install or to relocate, fixtures or mechanical equipment, in any structure, public or private, in the forty-eight States, the District of Columbia, Puerto Rico or the Virgin Islands, except to the extent permitted under paragraphs (d), (e) and (f), or when and to the extent specifically authorized under paragraph (h). No person shall carry on or participate in any construction, repair work, addition, improvement, conversion, alteration, installation or relocation of fixtures or mechanical equipment prohibited by this order. The prohibitions of this paragraph apply to a person who does his own construction work, to a person who gets a contractor to do the work, to contractors, sub-contractors, architects and engineers working on a job which is being carried on in violation of this order or getting others to work on it or to supply materials for it."

Under Sec. 3(j) "Violations," said Order states:

"Any person who wilfully violates any provision of this order or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using material under priorities control, and may be deprived of priorities assistance."

Under the Second War Powers Act heretofore referred to, in which the President was empowered to delegate any agency to enforce the provisions thereof, in Sec. 2(a) 5 of Sec. 633, it was made a criminal offense for any person to wilfully perform any act prohibited under subsection (a) thereof, or any rule, regulation or order thereunder,

whether heretofore or hereafter issued, and made the violation thereof a misdemeanor subject upon conviction to a fine of not more than $10,000.00 or imprisonment for not more than one year, or both.

In *U. S.* vs. *Elade Realty Corporation,* 157 F.(2d) 979, at page 980, the Circuit Court of Appeals, Second Circuit, on November 12, 1946, in affirming a conviction for violation of a regulation made pursuant to the Second War Powers Act, stated:

> "The Act gave power to the President to allocate any materials of which there was a shortage 'for the defense of the United States * * * upon such conditions and to such extent as he shall deem necessary or appropriate * * * in the public interest and to promote the national defense. Although, as we have seen, the regulations allowed prospective builders, who needed 'priority' materials, to set their own prices, they held them to what they set, and they imposed as a further limit upon any sale 'the fair market price,' and never more than $6,000. It seems to us of no consequence whether this be called 'price-fixing'; the only relevant question is whether the regulations were ancillary to the purpose of the Act. We hold that they were. Their primary object probably was to assure houses for those who were making munitions of war by directing such materials as were not needed for the actual manufacture of these, to the construction of cheap houses. Nobody can question that, so far as this was in fact the effect of the regulations, it implemented the Act, even under its narrowest interpretation: those who make weapons must have shelter, and the cheaper the shelter, the less drain upon the national resources. We cannot be entirely sure whether the regulations forbad all construction except

> of houses for 'warworkers,' and for this reason we shall assume that 'priority' materials might be allotted to other houses. Even so, the limits imposed were such as 'to promote the national defense'; for they made it certain that any building, even though not directly connected with the production of munitions, should be cheap; and that pro tanto limited the drain upon the total stock of available materials."

In the instant case the Order VHP-1, under Executive Order No. 9638, was issued for the laudatory purpose of furnishing low-cost housing accommodations to meet the needs of returning veterans and was, we submit, an act in the public interest and to promote the national defense.

In *Rose* vs. *United States*, 149 F.(2d) 755, the Circuit Court of Appeals, Ninth Circuit, upheld a conviction for violation of a regulation issued by the Office of Price Administration, under the authority of the Second War Powers Act, sustaining the validity of such regulation, analagous to the present case.

III.

The Acts Charged In The Information Were Unlawful And Were Not In Violation Of The Constitutional Rights Of The Appellants

The appellants, on page 6 of their Opening Brief, contend that the First and Second War Powers Acts are unlawful delegations of war powers to control a peacetime emergency and, therefore, are unconstitutional and void. This contention, we believe, is without merit and was so determined in the case of *Rose* vs. *United States*, herein-

above referred to, where the Circuit Court of Appeals, Ninth Circuit, on June 4, 1945, ruled as follows:

> "The Second War Powers Act, 50 U. S. C. A. Appendix, §633, is not unconstitutional. It establishes standards detailed enough to overcome the objection of an invalid delegation of power. United States v. Randall, 2 Cir., 1944, 140 F.2d 70; O'Neal v. United States, 6 Cir., 1944, 140 F.2d 908. Appellants' contention that the Act is too vague and indefinite to form a standard of penal conduct does not give effect to subsection 2(a)(2), which authorizes the President to allocate materials or facilities in definitely prescribed circumstances."

In *Porter* vs. *Shibe et al,* 158 F.(2d) 68, at page 72, the Circuit Court of Appeals, Ninth Circuit, on November 5, 1946, in passing upon the Price Control Extension Act of 1946, passed July 25, 1946, 50 U. S. C. A., Appendix, Sec. 901, ruled:

> "The Act of July 25, 1946, was enacted by the Congress in the exercise of its war power. The war power is a broad and comprehensive grant. It is 'well nigh limitless.' It embraces those powers necessary to maintain our national defense and security. It is essential to the preservation of our country as an independent nation and the perpetuity of our liberties. While the war power is subject to the limitations of the Fifth Amendment, the courts must guard against impairing its essential attributes or endangering the ability of the nation to maintain its defense and security and its status as a free and independent state."

The Court, at page 73, further stated:

> "A law is not unconstitutional merely because it results in financial injury to a citizen where it is

reasonably necessary to preserve important public interests. Neither is it unconstitutional because it preserves one interest over another if there is a preponderant public concern in the preservation of the one over the other. Here, the important national interest is the making available to tenants of housing accommodations in important defense-rental areas at non-inflationary rentals in furtherance of the national defense and security.

"Many of the lawful demands made on the citizen in the exercise of the war power result in financial loss to the citizen. Individual suffering and sacrifice are inevitable concomitants of war. Moreover, here the financial injury is nominal only and not substantial."

We again submit that the case now under consideration should be considered in the light of the rulings of the Ninth Circuit Court of Appeals just quoted. The purposes of the Veterans' Housing Program, as set forth in VHP-1, are tantamount in importance to the national defense and public welfare, as were the regulations under the Act of July 25, 1946.

K. & J. Markets v. *Bowles,* 57 F. Supp. 294, affirmed per curiam on opinion of the District Court, 148 F. (2d) 661 (C. C. A. 3); *Shreveport Engraving Co.* v. *United States,* 143 F.(2d) 222 (C. C. A. 5), certiorari denied, 323 U. S. 749, and *Yakus* v. *United States,* 321 U. S. 414, upheld the constitutionality of the War Powers Acts, the delegation of authority and the legality of orders issued thereunder.

In connection with the allocation or priority powers,

the courts have held that the administrative agency charged with its execution could properly adopt measures reasonably designed to carry out the purposes of the Act. *L. P. Steuart and Bro., Inc.* v. *Bowles*, 322 U. S. 398; *Shreveport Engraving Co., supra; Gallagher's Steak House, Inc.* v. *Bowles*, 142 F.(2d) 530, 534 (C. C. A. 2), certiorari denied, 322 U. S. 764; *Varney* v. *Warehime*, 147 F.(2d) 238, 244-245 (C. C. A. 6), certiorari denied, 325 U. S. 882.

Appellants' contention that the war powers are no longer applicable since the war is over is without merit. The Supreme Court has consistently held that a federal statute, the applicability of which is limited, by one form of words or another, to a state of war, does not cease to be operative until the state of war has been terminated by treaty, act of Congress or executive proclamation. There has been no such termination, and the war powers generally are still in effect. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *The Protector*, 12 Wall. 700, 701-702; *United States* v. *Anderson*, 9 Wall. 56, 70; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 57. See also 40 OAG 100 of September 1, 1945.

It is well established that the power to wage war delegated to the Federal Government by Art. 1, Sec. 8 of the Constitution of the United States, encompasses the exercise of powers far beyond those directly concerned with the waging of a fighting war. Such functions as the power to fix maximum prices, (*Bowles* vs. *Withingham*, 321 U.

S. 503; *Taylor* vs. *Brown*, 137 F.(2d) 654; certiorari denied, 320 U. S. 787; *Brown* vs. *Wright*, 137 F.(2d) 484); to allocate scarce materials; (*Bowles* vs. *Wilemon*, 139 F. (2d) 730, certiorari denied, 322 U. S. 748); and to enact an alcoholic liquor prohibition statute, (*Hamilton* vs. *Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146,) have all been upheld.

The power to wage war carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress. This power is not limited to the actual fighting and dispersal of the fighting forces. (*Hamilton* vs. *Kentucky Distilleries and Warehouse Co.* cited above).

World War II has not been terminated by the signing of treaties of peace. Since the surrender by the nations and forces at war with the United States and her allies, the President and Congress have relinquished or set aside certain wartime controls, but have not declared the period of national emergency to have ended. On December 31, 1946, the President in Proclamation 2714, 12 Fed. Reg. No. 1. in proclaiming the cessation of hostilities of World War II as of December 31, 1946, stated:

> "Although a state of war still exists, it is at this time possible to declare and I find it to be in the public interest to declare that hostilities have terminated."

The Congressional intent to continue some necessary wartime controls after the actual end of hostilities is evidenced by the Act of Congress of December 28, 1945, C.

590, Sec. 1(f) 59 Stat. 658, extending the Second War Powers Act to June 30, 1946, and on June 29, 1946, further extending the termination date from June 30, 1946, to March 31, 1947, except for the purpose of allocations of building materials, Title III of said act shall remain in force and effect until June 30, 1947. (50 U. S. C. A., Sec. 645, 1946 Cumulative Annual Pocket Part).

Congress has ratified and confirmed the action taken by the President and the Civilian Production Administration. Executive Order No. 9638, creating the Civilian Production Administration, was issued October 4, 1945. The powers previously exercised by the War Production Board under Executive Order No. 9024, of January 16, 1942, (7 Fed. Reg. 329) were thereby transferred to the Civilian Production Administration, and the War Production Board was abolished. The Civilian Production Administration, on March 26, 1946, promulgated Veterans' Emergency Housing Program Order No. 1 (VHP-1), which is the basis of the violation charged in the instant case. By the Act of Congress of March 22, 1946, (Public Law 329, 79th Congress, Chap. 107, 2d Session) the Congress of the United States appropriated "For an additional amount, fiscal year 1946, for 'Salaries and Expenses,' Civilian Production Administration, including the objects specified for the appropriation 'Salaries and Expenses, War Production Board,' in the National War Agencies Appropriation Act, 1946, $1,500,000." By the Third Deficiency Appropriation Act, 1946, approved July 23, 1946, (Public Law 521.

79th Congress, Chap. 591, 2d Session) the Congress of the United States appropriated $18,000,000 for the necessary expenses of the Civilian Production Administration for the fiscal year 1947.

Among the many authorities holding that subsequent Congressional enactments may be relied upon to establish confirmation and approval by Congress of the interpretation and construction placed upon legislation by executive and administrative agencies are the following Supreme Court decisions :

Brooks v. *Dewar*, 313 U. S. 354, S. Ct., L. Ed.
Swayne & Hoyt Ltd. v. *U. S.*, 300 U. S. 297, S. Ct. L. Ed.
Wells v. *Nickels*, 104 U. S. 444, 26 L. Ed. 825.
Hirabayashi v. *U. S.*, 320 U. S. 81, S. Ct., L. Ed.

When Congress appropriated money for the support of the Civilian Production Administration it approved the creation by the President of that executive agency for the purposes specified in the executive order and the actions of the Civilian Production Administration in the fulfillment of those purposes.

IV.

The Veterans' Emergency Housing Act Of 1946, Enacted May 26, 1946, Does Not Cover Violations Of Veterans' Housing Program Order 1, Issued March 26, 1946.

The appellants, on pages 5 and 6 of Appellants' Opening Brief, in their argument, appearing under a, b and c of the Argument Summary, appear to consolidate the As-

signments of Error Nos. 1 to 4, inclusive, and, in d. of the Argument Summary, (T. R. 6) appear to inject an argument in the nature of another Assignment of Error.

Under the Rules of the United States Circuit Court of Appeals, Ninth Circuit (Criminal Appeals Sec. 2, Assignment of Errors) the rule states:

> "(d) Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard thereon except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

The exceptions not presented in the Assignment of Error are abandoned. *Roberts* vs. *U. S.*, 60 F.(2d) 871, at page 873.

The Veterans' Emergency Housing Act of 1946, which the appellants claim was not violated by the acts charged in the Information, was enacted May 22, 1946, after the commission of the offense set forth in the Information. The Veterans' Emergency Housing Act of 1946, therefore, is not the statute under which the appellants were prosecuted, and not under consideration herein.

The power of the Civilian Production Administration was not superseded by the Emergency Housing Act, 50 U. S. C. 821, dated May 22, 1946. This act was specifically to establish a "house-construction program" and provided for the appointment of a Housing Expediter. Both the Act and Executive Order 9686 of January 26, 1946 (11 F. R. 1032),

provided that the Expediter shall "consult and cooperate with other agencies of the Federal Government * * * with respect to the problems created by the Housing Emergency and the steps which can be taken to remedy it." Executive Order 9638 (10 F. R. 197) creating the Civilian Production Administration provided that "its functions and powers shall be utilized to *further* a swift and orderly transition from war-time production to a maximum peace-time production in industry free from war-time Government controls." (Underscoring supplied.) Obviously the purpose of establishing the Authority was to bring about an "industry free from war-time controls," and this statement was not intended to mean that such a purpose had already been accomplished, but was a statement of the objectives and purposes of the order. The section of the order as quoted and underscored by appellant conveys an erroneous impression. This order further provides that the Civilian Production Administration shall "allocate scarce materials and facilities necessary for the production of low priced items * * *." There is no conflict between these executive orders and the order of the Civilian Production Administration, on the one hand, and the Emergency Housing Act, on the other; in fact, the proper allocation of scarce materials by the Civilian Production Administration in cooperation with the Housing Expediter would make possible the accomplishment of the purposes of the Emergency Housing Act; they should be read together and their purposes and functions coordinated.

In Appellants' Opening Brief, page 24, line 24, appellants attempt to inject into the record a contention that "the building erected by defendants was for the Tahoe Sky Harbor Airport, and was used almost entirely as an airport administration building." There is nothing whatever in the Transcript of Record to justify or permit the consideration of such contention. The Information sets forth the charge to which the appellants entered their pleas of nolo contendere, after they and their counsel had been fully informed concerning the nature of the charges. They now seek in their appeal to present for review factual matters in conflict with the Information without, at any time prior to this appeal, raising such questions in any manner whatsoever in the trial court.

Conclusion

We submit that there is no error, either assigned or argued by the appellants or apparent in the record, to warrant a reversal of the judgment appealed from.

DATED April 7, 1947.

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